

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION IV

CA06-262

November 8, 2006

MARTI ANN GAYER

APPELLANT

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[J03-893-3]

V.

HON. STACEY A. ZIMMERMAN,
CIRCUIT JUDGE

ARKANSAS DEP'T OF HUMAN
SERVICES

APPELLEE

AFFIRMED

Appellant Marti Gayer appeals the termination of her parental rights to her three sons. She argues that the trial court violated her due-process rights; erred in proceeding with the termination without appointing her counsel and later by appointing her ineffective counsel; and erred in finding that there was sufficient evidence to support the termination. We affirm.

On November 17, 2003, a Family in Need of Services (FINS) case was opened for M.A., Gayer's son who was born on December 24, 1999. During a hearing on the petition, the court discovered that Gayer had two other sons, C.A., born on April 10, 1997, and J.A., born on February 27, 2002. The children lived with Gayer's parents, Karen and James Akin. The court found the family was in need of services because of Gayer's admitted recent abuse of methamphetamine, evidence presented that the home where the children resided was

unclean and dangerous, and Gayer's employment instability. The court immediately placed the children in the care of the Akins and ordered that a protective-services case be opened to begin counseling and treatment for Gayer. She was ordered to move out of her parents' home, to find suitable residence, to find stable employment, to abide by the terms of her probation, to follow the visitation schedule dictated by the court, and to not use drugs.

At a review hearing, it was revealed that appellant had not completed parenting classes; had showed up unannounced at her parents' home; had fought with Karen Akin in front of the children; and had not attended drug and alcohol treatment as required. Additionally, she had been arrested for violating her probation. Gayer testified that she was living with her new boyfriend's parents, that she had a job but had lost it, that she did not have reliable transportation, that she had only been to two drug-treatment sessions since the last hearing, and that she had not attended any parenting classes since the last hearing. The court ordered that the children stay with the grandparents, held Gayer in contempt, and warned her to follow the future orders of the court. The court found the children dependent-neglected and set the case for review.

At the next review hearing, DHS reported that a methamphetamine lab had been discovered in the grandparents' home a couple of months earlier.¹ The court ordered that the

¹The court admonished DHS and the attorney ad litem for not reporting this incident to the court prior to the review hearing. However, DHS explained that it had not asked for the children to be removed from the home because it believed—at the time—that the grandmother had nothing to do with the drugs and that it would be in the children's best interest to stay with the grandmother.

grandparents be drug tested, and although they both tested positive for methamphetamine, Karen Akin claimed she had never used drugs. The court ordered a hair-follicle test, removed the children from the grandparents' home, and scheduled a permanency-planning hearing.

At the permanency-planning hearing, it was announced that both grandparents tested positive following the hair-follicle test. Although all three boys were having adjustment issues and behavior problems in foster care, DHS reported that they had improved slightly since being removed from the grandparents' home. Gayer admitted that she was incarcerated and had not complied with the case plan. The court found that it could not return the children to Gayer, due to her incarceration, and it could not return the children to the grandparents because of their drug problems. Additionally, although the children were fathered by three different men, none of those men had approached the court to ask for custody.² The court changed the goal of the case from reunification to termination.

At the termination hearing on September 23, 2005, Marcia Stratton, a DHS family worker, testified that the children were initially removed from Gayer's custody in December 2003. After being placed with the grandparents, they were removed from their home in February 2005. Gayer had been incarcerated for a time prior to February 2005, as well as continually since that date and the termination hearing. Stratton testified that all three boys were adoptable.

²Later, at the termination hearing, C.A.'s putative father returned and asked for an opportunity to retain his rights to his son, which the court allowed.

The court found that Gayer had failed to provide for her children's basic needs. She had been in prison much of the time since the children had been removed, had not held stable employment, and had not had a suitable residence. She failed to obtain drug treatment or parental counseling. She violated her parole, tested positive for drugs, and was re-incarcerated. Thereafter, the court terminated her parental rights.

Gayer argues on appeal that the evidence presented to the trial court was insufficient to terminate her parental rights. Arkansas Code Annotated section 9-27-341(b)(3) (Supp. 2005) requires that an order terminating parental rights be based upon clear and convincing evidence. Our law is well settled that when the burden of proving a disputed fact in circuit court is by clear and convincing evidence, the question that must be answered on appeal is whether the circuit court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous. *Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). Clear and convincing evidence is that degree of proof that will produce in the fact finder a firm conviction as to the allegation sought to be established. *Id.* In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial judge to determine the credibility of witnesses. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

We are convinced that the trial court did not err in finding sufficient evidence to terminate Gayer's parental rights. The court found that she had neglected to make any

attempt to comply with the case plan other than to visit with her children—something she failed to do on a consistent basis or in compliance with the order of the court. Gayer was arrested at least twice while her children had been removed from her custody, for probation violations and drug charges. She never maintained stable employment, never secured housing, never attended parenting classes, and never completed her drug rehabilitation. Moreover, she was incarcerated at the time of the termination hearing with no firm release date.

Gayer asserts two additional points on appeal—that the trial court violated her due-process rights and that it erred in failing to provide her counsel or to provide her effective assistance of counsel. However, we decline to review the merits of either point because neither issue is preserved for our review. Even in a case involving termination of parental rights where constitutional issues are argued, we will not consider arguments made for the first time on appeal. *Myers v. Ark. Dep't of Human Servs.*, 91 Ark. App. 53, ___ S.W.3d ___ (2005). Appellant never argued below that the procedural process culminating in the termination of her parental rights violated her constitutional rights of due process. Additionally, although she argues—simultaneously—that she was not represented by counsel and that her appointed counsel was ineffective, she failed to make these arguments below. Therefore, they are also not preserved for our review.

Affirmed.

HART and BAKER, JJ., agree.